United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2381

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IN THE

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MICHAEL HOLODNAK,

Plaintiff-Appellee,

VS.

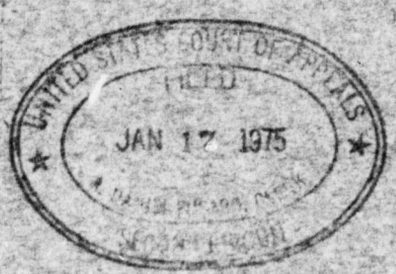
AVCO CORPORATION, AVCO-LYCOMING DIVISION,
STRATFORD, CONNECTICUT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE PLAINTIFF-APPELLEE



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The plaintiff Michael Holodnak submits this brief in opposition to the appeal of the defendant Avco Corporation. The opinion below is reported at 381 F. Supp. 191 (Conn. 1974).

STATEMENT OF THE CASE

INTRODUCTION

This case, as Judge Lumbard stated in his opinion, "involves

the basic right of freedom of speech and press" (94a).* A factory worker, distressed by the quality of union representation on his job, and acting alone, chose to unburden his frustrations by writing about them in a little known publication, the AIM Newsletter, with a tiny circulation (about 750 copies). The article was not distributed in the plant, and it is not known how company officials obtained a copy. The district court on two occasions carefully reviewed the article and found it relatively "moderate", and "less vituperative and critical" than typical union leaflets (63a, 83a). For writing the article, plaintiff was summarily fired, and the dismissal was upheld by an arbitrator. If plaintiff could be cut off from his livelihood for publishing his thoughts about his job, then millions of workers in industrial America cannot speak about the thing that concerns them the most.

THE JUDGMENT BELOW

The judgment below was against Avco Corporation and Local 1010, United Automobile Workers of America (146a-147a). Local 1010 was held to have breached its duty of fair representation. It has chosen not to appeal and has paid in full the counsel fees assessed against it in the amount of $6,749.45 (147a). This case, therefore, comes to the court with a final and conclusive finding that the union representing plaintiff breached its duty of fair representation in the grievance proceedings Avco asks the court to reinstate. 1B Moore's Federal Practice §0.404.

*Figures in parentheses with the letter "a" refer to pages of the joint appendix.

STATEMENT OF FACTS

HOLODNAK'S DISMISSAL

Michael Holodnak is 49 years of age and was employed by Avco for over nine years at the time he was fired on May 28, 1969 (150a). He was earning $3.73 an hour or $149. a week plus overtime (155a).

Avco is a conglomorate engaged in defense contracting at a facility in Stratford, Connecticut. In 1969 it employed approximately 8,000 employees at that facility (94a, 153a).

On May 28, 1969, at 9:00 A.M., without any prior warning, Holodnak received a written order to report to the company's Labor Relations office, for a "disciplinary hearing" (158a; Ex. 3, 395a). Holodnak did not know what the hearing was about, nor did the two union representatives with whom he immediately consulted, Frank Guida, a shop steward, and Joe Mesick, a committeeman. They made inquiries of the company but were not told anything (159a-161a).

At 10:00 A.M., accompanied by Guida and Mesick, Holodnak went into the Labor Relations office. Three or four company officials were there including William Ashlaw, the Labor Relations Chief (162a, 351a). Ashlaw showed Holodnak a copy of the article published in the "AIM Newsletter" on May 15, 1969 (163a; Ex. 4, 396a-397a). He asked Holodnak whether he adhered to the "tenor and philosophy" of the article; Holodnak told him that he did (163a). Ashlaw then stated that the article was "slanderous" and in violation of Plant Conduct Rule No. 19, which reads (164a; Ex. 5, 398a):

"The below listed rules constitute prohibited conduct. Offenses under these rules may be cause for suspension or discharge:

. . .

"19. Making false, vicious or malicious statements concerning any employee or which affect the employee's relationship to his job, his supervisors or the Company's product, property, reputation or goodwill in the community."

Ashlaw asked Holodnak whether he agreed with what he had written in the article. Holodnak said that he did. Ashlaw then told him that the company "could not countenance this type of philosophy" and was asking for Holodnak's termination (166a).

The union officials present had not seen the article since it was not distributed in the plant, and they asked for a recess to read it (166a, 167a). They found nothing wrong with it and the discussions resumed in the Industrial Relations office with Ashlaw continuing to insist on Holodnak's dismissal (168a).

Mesick asked whether there "could be a lesser charge brought against [Holodnak] instead of a termination." Ashlaw replied "absolutely not"(168a). At one point in the interrogation, Ashlaw inquired of a company security representative who was present whether the AIM Newsletter "was on the Attorney General's subversive list." The security representative advised him that it was not (168a). Holodnak's identification badge was then taken from him. He was given his jacket and escorted out of the plant (169a).

Ashlaw testified at Holodnak's arbitration hearing that he offered Holodnak an opportunity to avoid termination if he "disavowed the article" and "made a public denial" (517a). This is not substantiated by Holodnak's testimony or that of the two union officials concerning the meeting with Ashlaw on May 28. The

union officials both confirmed that they asked the company to consider a "lesser penalty to be given to the man" (329a) or to "make it a lesser offense to get the guy off the hook" (354a). The company "wouldn't move on it" (329a).

The disconcerting aspect of Ashlaw's testimony is that Avco should have no hesitation in linking itself to efforts to secure a disavowal or recantation of a written article. Lost on Avco is any appreciation that in an open and democratic society ideas compete, they do not get stamped out by public confessions. As we will show, efforts to obtain Holodnak's disavowal continued through the arbitration hearing and were eagerly joined in by the arbitrator. Judge Lumbard observed that "emphasis" throughout the arbitration "seemed to be on instructing Holodnak on the mistake of his ways" (79a).

Following his termination, a grievance was filed on Holodnak's behalf initiating further steps in the grievance procedure provided in the collective bargaining agreement (333a-334a; Ex. 6, 399a).

Several weeks later Holodnak was informed by Mesick that step 3 of the grievance procedure had been held, the company "remained adamant," and the Union had voted to refer the matter to arbitration. Holodnak was not present at the third step of the grievance procedure (173a).

HOLODNAK CONSULTS WITH ATTORNEY GEORGE JOHNSON

Shortly following his termination, Holodnak consulted with

the attorney for the AIM Newsletter, George Johnson (171a). Johnson advised him that he would have to exhaust the contract grievance procedures (259a). Johnson promptly communicated with the union attorney, Edward Burstein, and informed him that he wanted to help in any way that he could. Burstein told Johnson he knew nothing about the case but would get in touch with him when he knew more (Ex. 15, 571a-572a). Johnson never heard from Burstein again (577a).

Subsequently, Johnson heard from Holodnak (not Burstein) that the case had been scheduled for arbitration. Johnson again made an effort to get in touch with Burstein but Burstein failed to respond to Johnson's communications (576a-577a). Johnson explained that his client, the AIM Newsletter, was very concerned about the case because "it was obvious to them and to me that if people could be fired as a result of articles which they wrote for our Newsletter, then our sources of articles would dry up and in general that would have a chilling effect on our ability to present news items of interest to the New Haven community and to AIM members" (570a-571a).

Johnson further explained that he was anxious to help Burstein because "there were very difficult and complicated First Amendment issues present in this case...and I have done a lot of work in the First Amendment area and I believe that a good deal of research and drafting needed to be done to make an effective presentation to the arbitrator" (578a). Following the publication of the arbitrator's award, Johnson again wrote to Burstein and asked that he communicate with him. Burstein never replied (577a, 578a).

THE AIM NEWSLETTER

The AIM Newsletter was a bi-weekly publication printed and circulated in the New Haven area by a splinter political party, The American Independent Movement (AIM) whose activities included running a candidate for Congress (169a-170a, 283a-284a).*

AIM was formed by a group of people who had been involved in the peace movement and "community action" in New Haven (284a-285a). The circulation of the Newsletter was concentrated in New Haven, where all the Newsletter staff resided (283a,285a). New Haven is approximagely 20 miles from Stratford. All work involved in the publication of the newsletter was volunteer. No one on the staff was paid, nor were the writers who contributed articles, including Holodnak (285a). The Newsletter dealt with such subjects as "urban renewal", "peace activities", "questions of interest in the labor movement", and "other issues that were of interest in New Haven" (285a).

The full issue of the Newsletter in which Holodnak's article appeared, is in evidence as Exhibit 4. Since replaced by another publication, the Newsletter had a total circulation of about 750 (283a). Some corporations subscribed. The Newsletter staff member who testified at the trial was unable to state positively that

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* Several paragraphs of Judge Lumbard's written opinion in which he describes the AIM Newsletter, quotes plant conduct rule 19 and begins his discussion of Holodnak's article have been unaccountably omitted from the joint appendix prepared by Avco. The omitted material belongs between the last word on page 75a of the appendix and the first word on page 76a. It can be found in the officially reported opinion at 381 F. Supp. 194-5 beginning on page 194, line 13 with the word "Newsletter" and ending on page 195, line 12 with the word "company."

Avco was a subscriber, but said "I think that it may have been" (283a). Avco chose to leave the record in that state. The Newsletter sold for 20 cents a copy or $5. a year, and it was distributed both on newsstands in New Haven and through a mail subscription list (284a). Following Holodnak's dismissal, the Newsletter adopted the practice of warning would-be contributors that publishing could jeopardize their jobs (287a).

HOLODNAK'S ARTICLE

By any fair reading, Holodnak's article is a mild document. As Judge Lumbard stated, it is "Holodnak's...analysis of why unions lose their militancy" (97a). It is "largly composed of Holodnak's opinions concerning labor-management relations at Avco ...." (97a). It makes no accusations against any individual of "illegal activity" (96a). In fact it mentions no names, not even those Holodnak believed "had not acted in the best interest of the workers" (96a). As Judge Lumbard so accurately put it, "throughout the grievance and arbitration proceedings Holodnak... evidenced great reluctance to disclose the identities of those he had in mind in writing the article (96a).

The article states important truths about the local union at Avco and the American labor movement in general. Rank and file members tend to be aggressive in their demands. Union leaders for several reasons are unable to respond. They counsel "moderation," so that the company will not move away or Congress enact repressive laws. Through day-to-day dealings with company representatives, union leaders tend to be won over to a company

perspective on issues. The differences in outlook breed resentment and alienation. Union officials grow cynical and regard the rank and file as "selfish and fickle." The rank and file consider themselves "betrayed". In Holodnak's view, the officials fail to channel rank and file militancy effectively. Both Judge Lumbard and Magistrate Latimer found Holodnak's article less strident than typical union literary efforts in the "rough-and-tumble" of labor relations at Avco (60a, 83a). A few choice quotations from union circulars are included in Judge Lumbard's opinion (80a).

Holodnak never circulated the article in the plant; and did not even show it to anyone after it was published (170a). Before it was published, he showed a draft of the article to "approximately a dozen fellow employees" to determine whether he was "accurately" reflecting the "feelings" of a "cross-section of the employees" (170a-171a).

Holodnak is a tool and die maker by trade and a writer by avocation. He has written several novels and short stories and many articles (150a-151a; 191a). He is self-taught, his formal education having ended in the eighth grade (428a).

THE ARBITRATION HEARING

Following the failure to resolve differences in the preliminary stages of the grievance procedure, the controversy was scheduled for hearing on July 17, 1969, at the Howard Johnson Motor Inn in West Haven before arbitrator Burton Turkus, the "permanent arbitrator" at the Avco plant. Holodnak learned of the hearing only three days before it was to take place in a telephone call from

Committeeman Mesick (174a).

Union Attorney Burstein made no effort to meet or speak with Holodnak before the hearing (174a). Holodnak arrived at the Motor Inn at 9:00 A.M., but Burstein was not there. He did not come in until 10 or 15 minutes before the hearing was scheduled to begin (175a). The first thing Burstein did was to "acquaint" himself with Holodnak's article. He read it in Holodnak's presence for the first time (78a, 196a).

Immediately after reading the article, Burstein was hostile, and told Holodnak "if I were the Union, I wouldn't defend you on this" (177a). He said that he considered AIM a subversive organization. He was familiar with leaflets AIM had circulated at the plant, and they "sounded subversive to him" (178a). The leaflets Burstein made reference to charged corporations with making excess profits (178a). In the few minutes he had with Holodnak before the hearing began, Burstein did not review with him the questions he would be asking at the hearing or the testimony he would seek to elicit (181a-182a). Burstein also did not inform Holodnak of the procedures that could be anticipated at the hearing (181a-182a). The meeting with Burstein did not last longer than 10 or 15 minutes (182a).

Following that meeting, Burstein and Holodnak entered the hearing room and the hearing started (182a). Burstein was so unprepared for the arbitration that he began by asking to be informed of the rule the company claimed Holodnak had violated (78a, 405a). After being told that it was Rule 19, Burstein observed that Holodnak's right of free speech was at stake (78a, 407a).

Shortly thereafter, the arbitrator asked whether Burstein would be attacking the fairness and reasonableness of the rule. Burstein stated for the record that "there is no contention that it is an unreasonable policy requirement" (410a). Judge Lumbard found that Burstein's action in conceding the reasonableness of the rule was probably the result of his "inadequate preparation." Burstein should have argued that statements such as Holodnak's were not covered by the rule (89a-90a).

As is normal in arbitration proceedings involving disciplinary action against an employee, the company had the burden of proof (406a). Notwithstanding, the company called Holodnak as its first and main witness. He was on the stand for most of the day except for a brief period when several other witnesses were called for very short testimony (184a-185a). The arbitration hearing, in Judge Lumbard's words, turned out to be a public inquisition into Holodnak's "political and social views as well as his personal background" (79a).

The company and union attorneys, and the arbitrator, teamed up to make Holodnak squirm for what they considered his radical and unorthodox views of "corporatism" and "the corporate structure," while at the same time they scrutinized his private affairs and private beliefs. He was interrogated about the books he read (428a), the candidates he supported for political office (429a-430a), and his views on "corporatism" (whatever that means) (431a). The arbitrator permitted the company to inquire whether Holodnak's views on "corporatism" "influenced" his article "to any extent" (433a-434a).

The arbitrator considered it proper to ask Holodnak whether he had visited Cuba in 1960 and published articles about the trip, and his views on the "Castro system" (434a-438a). Burstein joined in and asked Holodnak whether he wrote the article with "an idea of advocating any revolutionary form of overthrow of the corporate structure" (502a-503a). Much of the arbitration was concerned with harranguing Holodnak about the basis of the claims he made in the article (443a). The arbitrator participated, and he obviously relished justifying his own function as the permanent arbitrator in the Avco grievance procedure, and emphasizing the claimed advantages for a permanent arbitrator over a system of ad hoc arbitrators appointed on a case by case basis (448a-450a, 453a-454a).

The arbitrator questioned Holodnak intensely about his motives for writing the article (455a); and was insistent on finding out what "signals" Holodnak was sending out to his readers (460a-464a). Much like a Kremlin confessional, the arbitrator and counsel sought to cleanse Holodnak's mind for public viewing and extract from him admissions that "now you know differently, don't you" (467a); and that the article was the result of "certain mistakes you made," and another article like it would not be written if Holodnak were to return to work (504a) Judge Lumbard found that "the arbitrator openly badgered" Holodnak (85a).

Following the arbitration, the brief filed by the union was grossly condescending of Holodnak and ridiculed him as a pitiable subject aspiring to accomplishments beyond his station (Ex. 9, 560a-564a). The brief describes Holodnak as "politically conscious to an inordinate degree" (presumably a serious shortcoming).

It stated that he was a living example of the cliche that "a little knowledge is a dangerous thing," and "that which he knows is but a scintilla of what he doesn't know" (561a).

The brief repudiated Holodnak's testimony at the hearing as "replete with examples of this man's superficial knowledge, which because it was gleaned informally, is oftimes [sic] wrong, and even childlike in its naivete" (562a). It described him as "struggling hard to rise from the sewer of ignorance," and confessed for him that "his attempts to learn have exposed him to wrongful tenets" (562a). Finally, it apologized for him stating he "really knew not what he was doing" (562a).

Following the filing of briefs, the arbitrator in a one sentence decision, offering no explanation for the result, upheld Holodnak's dismissal with the curt statement that "the proof establishes the just cause for the discharge ... with conclusive finality" (Ex. 10, 565a). Despite Attorney Burstein's prophecy at the outset of the arbitration that "what is going to transpire" would have "repercussions that will go through the labor circles and the court circles of the country" (408a), the arbitrator was content to stay out of the limelight with a discreet one sentence decision that said nothing at all.

THE AFTERMATH

Holodnak has not been able to find employment since his dismissal (150a, 191a-192a). Approximately one month before the trial in this case, which was in April, 1974, he started to teach part time at the University of Bridgeport for which he is

not remunerated (149a, 191a). He testified at the trial that his total wage loss adjusted for disability benefits received was $54,160.58 (194a). A written financial loss statement he prepared was accepted into evidence (Ex. 14, Transcript 165)* Subsequently, Holodnak prepared an amended financial loss statement reducing his claim to $49,569.88 (100a). The amendment took into account testimony at the trial regarding working time that would have been lost because of a strike, and reduced earnings resulting from a lower labor grade for Holodnak due to layoffs (269a; Tr. 155). Avco did not challenge Holodnak's financial claims. However, in reviewing the testimony on damages, Judge Lumbard concluded that Holodnak had failed to prove that he sought "equivalent employment" during the four years proceeding the trial. Accordingly, damages for back pay in the amount of only $9,113.24 were allowed (101a). Judge Lumbard also declined to order Holodnak's reinstatement to his job. He stated as his reasons Holodnak's failure to seek work for several years, and his own observations of Holodnak's physical condition at the trial, which raised doubts that he was "physically capable of returning to doing the work he had been doing" (106a). Holodnak has not appealed; and Avco is not challenging the amount of the judgment for back wages.

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2. Plaintiff requested that Exhibit 14 be included in the joint appendix, but it was not.

RULE 19

Rule 19, on which Holodnak's dismissal was based, is best described as an employee gag rule. As with most such rules, it is a masterpiece of obscurity and ambiguity. To say that it is characterized by "overbreadth" is an understatement. The rule is not limited to the printed word but covers oral utterances as well. It is not limited to statements spoken or published in the plant, but applies wherever and under whatever circumstances an employee may choose to express himself. It is not limited to false statements but includes any statement the company considers "vicious or malicious." It is not limited to statements regarding particular employees (Holodnak's article, as was shown, does not mention the name of any employee.) Rule 19 covers any statement which "affects the employee's relationship to his job, his supervisors, or the company's products, property, reputation or good will in the community." Anything an employee might say could "affect" his relationship to his job.

CLAIMS FOR RELIEF IN THE COMPLAINT

The complaint sets forth three claims for relief. These are:

1. The award should be vacated under the Federal Arbitration Statute (9 USC §10) because of the "evident partiality" of the arbitrator and his failure to protect plaintiff's First Amendment rights (8a-12a).

2. Holodnak's dismissal infringed his rights of free

speech and press and the collective bargaining agreement which permits termination for "just cause" only (12a-13a).

3. Local 1010 breached the duty of fair representation owed to Holodnak (14a).

The district court in a thoughtful, persuasive and scholarly opinion upheld each of plaintiff's claims (87a, 90a, 100a). We will be commenting on the opinion throughout this brief.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN VACATING THE ARBITRATOR'S AWARD FOR "EVIDENT PARTIALITY"

In Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967), this Court stated that "when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators. See Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17 (2d Cir. 1962)." This is precisely what Judge Lumbard did in reaching his decision below (85a-87a). Moreover, there was a verbatim record to scan in this case. That is not always so. (Cf. Catz American Co. v. Pearl Grange Food Exchange, Inc., 292 F. Supp. 559 (SDNY 1968))

Holodnak's article was extremely critical of the Avco grievance procedure. He described it as being "arrogantly sabotaged by the company" and portrayed a "submissive Union" ineffective against this sabotage. He also referred to "biased judges and arbitrators" who "belong to the company." He described the "'impartial' arbitrator" sitting on a "heavenly perch" and

"backing up the company," while pronouncing "his God-like opinions upon us poor sinful mortals while praising the pure-as-the-snow 'patient company' to the high heavens." The arbitrator, as the transcript will reflect, took these statements personally, as a direct assault on his fairness and effectiveness.

The rising level of his antagonism toward Holodnak can be traced through the transcript as the hearing progressed. Early in the hearing he said that he would not let it "degenerate into any kind of a hearing as to this man's political affiliations, if any, or the concepts of any political party that he may be interested in" (426a). Seven pages later in the transcript, however, when company counsel stated that he was asking a question to determine whether "the AIM organization is opposed to corporatism in its present form", the arbitrator stated, "You have a perfect right to put those questions to him directly ..." (433a). Thereafter, in response to Holodnak's protest that he did not "know what my beliefs in this have to do with it," the arbitrator stated, "Well, that's what he's trying to find out, whether your beliefs about the subject influenced your article to any extent" (434a). One wonders what, aside from Holodnak's beliefs, the arbitrator thought "influenced" the article.

Repeatedly throughout the hearing, Holodnak was browbeaten into acknowledging that grievances were handled more expeditiously at the plant since the arbitrator became the sole impartial chairman, rather than previously when various arbitrators were designated by the American Arbitration Association to hear individual grievances (447a-449a; 533a-534a). Consistent with that, the arbitrator took it upon himself to stamp out any suggestion

that the union was supine and submissive. If that were the case, then, of course, grievance processing would be ineffective and the arbitrator in his role as impartial chairman would be an accessory to a fraud on employees.

The arbitrator was so incensed over the matter that frequently he did more testifying than Holodnak (465a-469a). He asked Holodnak whether it was the "general tenor and purport of the article to indicate that the union officials ... were supine and were not doing the job that they were supposed to do." When Holodnak answered he "thought that was true," the arbitrator lashed back, "now you know differently, don't you?" (466a-467a). Not content with that, two pages later in the transcript the arbitrator lectured Holodnak, "Well, don't you know, as a fact, when you wrote this article, that you have here a very militant and zealous union that seeks the protection of the rights of its membership and seeks to endorse [sic] all company obligations under the contract? Didn't you know that when you wrote this article?" (469a)

Later, on the same page of the transcript, the arbitrator continued, "Well, certainly when you wrote the article, you knew that there was no shortcoming, that this was not a supine union that sat by and allowed the company to do whatever it wanted...." Clearly, the defensive stance adopted by the arbitrator to protect the union was a demonstration of "evident partiality." No arbitrator as protective of the union as this arbitrator, could give plaintiff a fair hearing. Plaintiff's article was a cutting attack against the union. He could not hope for an unbiased determination from an arbitrator convinced that "there was

no shortcoming, that this was not a supine union ...."

The foregoing and other evidence of partiality were detailed by Judge Lumbard in his opinion (85a-87a). Avco responds in its brief with considerable scoffing and sneering, and grandiose factual claims that are not supported by the record. It dismisses the finding of partiality as "almost ludicrous" (Br. p. 23 It describes itself as having the "unfortunate feeling that we have been through an experience below best characterized as trial by tunnel vision" (Br. p. 10). The "findings" of the trial court are described as "at least ... askew and at worst ... completely astray" (Br. p. 11). It cites an opinion of this Court, Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17 (1962), and then gratuitously adds, "Judge Lumbard sitting as Chief Judge, interestingly enough" (Br. p. 27).

The fact is that Judge Lumbard wrote the opinion in Ballanti Books, supra. His knowledge of the practicalities of arbitration are reflected in that opinion. He discussed "those standards of informality and expedition appropriate to arbitration proceedings;" and recognized that arbitrators could "act affirmatively to simplify" matters before them, and this included participating in questioning "to speed proceedings and eliminate irrelevancies ..." 302 F.2d at 21.

Defendant further contends that Judge Lumbard was remiss in failing to learn, from alleged factual data that is not part of the record of this case, that the arbitrator was sitting "in the fashion of a court of equity conducting contempt hearings involving a scofflaw." Judge Lumbard should have somehow perceived that Holodnak was being "tried" for conduct "highly

disruptive and destructive of employee lives and business activities," and even "of the Vietnam conflict supply effort..." (Br. p. 12).

Judge Lumbard's perceptions of the issues were inaccurate, Avco contends, because he is "one unschooled in labor relations" (Br. p. 14). The fact is that the deep unrest allegedly attributable to plaintiff's article escaped Judge Lumbard's attention, because there is no testimony in the record to substantiate it. Avco put on no defense. It called one witness to describe how the plant conduct rules were posted and to corroborate the date of service of the complaint, and that was all (320a, 324a). There was no testimony concerning a "lengthy and dismal history of illegal strikes" for Judge Lumbard to give other than "perfunctory recognition."

More to the point, there was no testimony of a single overt act attributable to the publication of the article. There was no evidence that anyone at Avco read the article after it was printed except for company and union officials involved in the grievance proceeding. There was certainly no evidence that Holodnak participated in a wildcat strike. And there was no evidence of the occurrence of a single wildcat strike after publication of the article, whether attributable to the article or not. Avco claims that Judge Lumbard found the article "pallid" because of his lack of schooling in labor relations. Magistrate Latimer found it "rather moderate in tone and phrasing" (63a) Avco seeks to associate plaintiff with alleged "militant cohorts" and charge him with "inciting Avco employees." There is no support in the record for these charges.

At one point in its brief, Avco states that it is "forgetting context and emotion and real life for the moment" (Br. p. 21), and proceeds to speculate about what it was the arbitrator "had to be motivated by" in upholding plaintiff's dismissal. This attempt to bare the motivations of the arbitrator is sheer fiction. The arbitrator never disclosed his motivations. He carefully refrained from writing an opinion and announced his award in a single conclusory sentence. In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960), the Supreme Court stated that arbitrators should write "well-reasoned" opinions "to engender confidence in the integrity of the process."

Avco made no effort to call the arbitrator as a witness so that he could defend his ruling. He was the missing witness at the trial. He did not come forth to explain his motivations (assuming they were relevant) or anything else. Avco's efforts on this appeal to rationalize his actions and its own are not substantiated by the record. As Judge Lumbard observed, "no substantial explanation for [plaintiff's] discharge can be given. Avco's actions must be viewed as an irrational reaction to the article or as a calculated attempt to remove an employee who it considered to be a troublemaker" (105a). A co-worker of Holodnak earlier echoed the same thought. He called the dismissal "aberrational in the extreme," and "bordering on the irrational" (61a). Avco's brief strenuously attempts to obscure that

Holodnak was punished for writing an article and nothing else. The image of him as an "ally" of "militant cohorts" disrupting labor peace is a fiction Avco's brief seeks to promote.

Avco is still unable to accept that a factory worker who can express himself articulately in writing, may choose to do so to relieve whatever the internal pressures that writers everywhere relieve by writing. Judge Lumbard's fitting quotation from the Supreme Court's opinion in Thornhill v. Alabama, 310 U.S. 88, 103 (1940), is pertinent, namely, that "free discussion concerning the conditions in industry and the causes of labor disputes" is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."

The Supreme Court decisions cited by Avco in its brief (p. 21) which uphold the enforceability of agreements to arbitrate and encourage resort to arbitration to settle disputes arising under collective bargaining agreements are not in point, e.g., United Steelworkers v. Warrior & Gulf Navigation Corp., 363 U.S. 574 (1960); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974). The Supreme Court in these and related cases did not intend to insulate arbitrators or the parties to collective bargaining agreements (i.e., unions and employers), from employee criticism. The court also did not relieve arbitrators from the obligation of impartiality in adjudicating controversies submitted to them for decision.

The arbitrators' decisions cited by Avco at page 24 of its

brief similarly have no bearing here. All but one are routine insubordination cases. The remaining one involved an unauthorized work stoppage in which a union steward was suspended for five days for actually engaging in the stoppage. International Harvester Co., 14 LA 986 (1950).

Avco argues that Magistrate Latimer's failure in his ruling on the parties' cross motions for summary judgment to find partiality in the arbitrator precluded Judge Lumbard from such a finding. Nothing in Magistrate Latimer's opinion suggests that he was finally disposing of any issue in the case other than dismissing the complaint as to an individual defendant (73a). Magistrate Latimer was very careful to conclude his opinion with the explanation that summary judgment for either party would "rest in part upon inferences drawn from an inconclusive record" (72a).

Judge Lumbard's ruling vacating the arbitrator's award for "evident partiality" should be in all respects affirmed.

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT AVCO WAS REQUIRED TO OBSERVE PLAINTIFF'S FIRST AMENDMENT RIGHTS AND FAILED TO DO SO

A. The U. S. Government is Sufficiently Involved in Avco's Stratford Operations to Prohibit Infringement of First Amendment Rights.

In Buckley v. American Fed. of Television & Radio Artists, 496 F 2d 305, 309 (2d Cir. 1974), this court stated that "when private action becomes imbued with a governmental character, or when the Government significantly insinuates itself into the

operative activities of private parties, then action by private parties may be regarded as 'state action' and, if so, will be subject to all the constitutional limitations on governmental action." Citing Evans v. Newton, 382 US 296 (1966); Burton v. Willmington Parking Authority, 365 US 715 (1961).

In the present case, as in Buckley, supra, we are not literally dealing with "state action", but Federal or United States Government action. Cf. Railway Employees' Dep't v. Hanson, 351 US 225 (1956). Judge Lumbard summarized the facts on which he found governmental involvement in this case (92a-94a). They begin with the physical installation in Stratford where Avco operates. The facility covers some 77 acres and consists of numerous buildings and other structures (297a). The United States Government owns all the real estate including land and the many buildings (297a).

The Government also owns most of the machinery and equipment used in the manufacturing operations carried on at the facility (297a-298a). General Beverly Warren, Avco's vice-president in charge of the Stratford installation, claimed that Avco had equipment of its own at the locality, but he readily conceded that the United States Government owns "most" of the machinery and equipment (297a-298a). Avco pays no rental charges for the use of Government plant and equipment, although General Warren testified that this fact was "weighted" in determining the payments made to Avco for the work it did for the U.S. Government (298a).

The major part of Avco's business at Stratford was manufacturing two models of gas turbine engines for army helicoptors

(290a). Avco also built "re-entry vehicles" or nose cones for minuteman missles for the air force, and it made "constant speed drives" which were used in navy fighter planes (290a-293a). General Warren acknowledged that "by far the large proportion of our business" was government defense contracting (297a). He claimed to be unable to testify as to what the gross revenues were from defense contracting in 1969, but he did state that Avco had income of $28 million dollars from non-government business, and the government business exceeded this "by far" (297a). General Warren conceded that to the extent that the United States government owned the plant and equipment in Stratford, Avco had no capital investment in the facility (299a).

In addition to ownership of the real estate and machinery, the United States Government maintains a substantial "task force" at the Stratford installation. General Warren described three functions of that task force. One was to oversee "quality control." As he stated, "they have the right under the terms of these [government] contracts to look over our shoulder, if you will, as we do the inspecting. They have the right to actually do inspections themselves..." (302a). The task force also "audits" Avco's "general accounting activities," including its books and records (303a). Additionally, it has a "contract administration function", which involves "generally overseeing we are meeting the terms of the contract that we negotiated with the government" (303a).

The items manufactured by Avco at the Stratford plant for the United States Government are delivered to the Government at the plant and shipped out from there under Government bills of

lading (304a-305a). The Government contracts further require Avco to enforce various security procedures at the facility (305a). On the basis of this factual showing, Judge Lumbard had no difficulty in concluding that there was "substantial governmental involvement at Avco's Stratford plant," and this involvement constituted "sufficient governmental action for the First Amendment to apply"(94a).

This is not the first case in which the Government's involvement at Avco's Stratford plant has been inquired into by the Connecticut district court. In an earlier decision, United States v. Avco Corp., 270 F Supp. 655 (1967), the Hon. William B. Timbers reviewed the Stratford operations during a suit seeking an 80-day Taft-Hartley injunction against continuation of a strike at the plant. Judge Timbers found that Avco was the exclusive manufacturer of two models of helicoptor engines used in the Vietnam war, and that "continuation of the strike at the plant would imperil national safety."

The Harvard economist, John Kenneth Galbraith, has urged that the large defense contractors are "really public firms" and "should be nationalized" thereby converting them "from de facto to de jure public enterprises."* Professor Galbraith stated that he was referring both to companies that did all but a small fraction of their business with the government, and to the "defense subsidiaries of the conglomerates", which is Avco at Stratford. Many of the factors cited by Professor Galbraith in support of his thesis are exemplified by Avco.

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*John Kenneth Galbraith, "The Big Defense Firms Are Really Public Firms and Should Be Nationalized," N.Y. Sunday Times Magazine, November 16, 1969, p. 50.

As he emphasized, defense contractors such as Avco do not meet the most commonplace standard of private enterprise, namely, private ownership of capital. He pointedly commented on the "marked uneasiness" in these firms when questioned about who owns what. A "tedious inventory" is claimed to be necessary to determine this. Another factor demonstrating the public character of these firms is that the "Government extensively instructs them on their management." Still another factor is the extensive movement of personnel between the U.S. Defense Department and the defense contractors. Professor Galbraith calls them "complementary bureaucracies." General Warren in his deposition (p.5) confirmed that before coming to work for Avco he was a major general in the air force.

Professor Galbraith cited in his article another article by Professor Murray L. Weidenbaum*, whom he described as the "leading academic authority on the economics of weapons procurement." Professor Weidenbaum described the defense companies as "'becoming less like other corporations and acquiring much of the characteristics of a Government agency or arsenal.'" The defense firms, as Professor Galbraith summed it up, are "extensions of the public bureaucracy."

Avco's Stratford Operation is certainly little more than an extension of the Defense Department. Since the Government owns the entire facility, Avco's presence there obviously suits

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*Weidenbaum, Murray, "Arms and the American Economy: a Domestic Convergence Hypothesis," American Economic Review, May, 1969.

achieve the purposes of the Labor Management Relations Act

the Government's purpose. The production at the facility is, as Judge Lumbard stated, "almost entirely for the military" (93a). If Avco were not providing the Government with the services it wanted, then the Government presumably would find another contractor to take over or would do the work itself.

In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), a restaurant operated "in a purely private capacity" in a municipal parking garage was found to sustain a claim of state action. The fact that the restaurant was only one of a number of commercial enterprises in a parking structure, that it paid a substantial annual rent (Avco pays no rent), and that there were no requirements in its lease that its services be made available to the general public, did not deter the Supreme Court from holding that there was a sufficient "degree of state participation and involvement" to prohibit discriminatory action. In Wahba v. New York University, 492 F2d 96,101 (2d Cir. 1974) this Court deemed the fact that the restaurant in Burton was operated in a publicly-owned building, the distinguishing factor between that case and Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972).

In Powe v. Miles, 407 F2d 73, 82-83 (2d Cir. 1968), this Court found state action in the disciplining of students of the New York State Ceramics College by the president and dean of Alfred University, a private institution. The court held that the relationship between Alfred and the State Ceramics College was sufficiently close to support a claim of state action. The Court pointed out that if the disciplining had been done by the

dean of the Ceramics College because of acts of the Ceramics College students "in the State-owned buildings, the existence of state action would hardly be doubted." The Court emphasized that "the state furnishes the land, buildings and equipment; it meets and evidently expects to continue to meet the entire budget; it requires that all receipts be credited against the budget... and in the last analysis it can tell Alfred not simply what to do but how to do it." The United States Government retains the same authority over Avco.

In Kerr v. Enoch Pratt Free Library, 149 F2d 212 (4th Cir. 1945), state action was found in the activities of a private board of trustees, created by a private donor, that with public funding and other assistance was in effect operating the municipal library system for the City of Baltimore.

Avco appears to contend in its brief (p.31) that a finding of government involvement in this case hinges on the character of public access to the federal installation in Stratford where Avco operates. It cites cases involving a public park (Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954)) and a company town (Marsh v. Alabama, 326 U.S. 501 (1946), and argues that the "First Amendment is not applicable" unless the "facility [is] open generally to access by the public."

Avco manages not to comprehend that public access is one of many factors to be considered in determining Government involvement, and it is usually relevant where the constitutional right for which protection is sought requires access for its fulfillment. Public access is not relevant to the First Amendment rights sought to be vindicated in this case. It had no relevance to the claim of Govern-

ment action in Buckley v. American Fed. of Television & Radio Artists, 496 F2d 305 (2d Cir 1974) or Railway Employees v. Hanson, 351 U.S. 225, 232 (1956). It was extraneous to the holding in Powe v. Miles, 407 F2d 73 (2d Cir 1968), where this Court held that the regulation of demonstrations and discipline of students of the New York State College of Ceramics constituted state action. It did so not because the public may or may not have had access to Alfred University's football field where the demonstration took place. That was not important enough to be mentioned. The significant fact was that the College of Ceramics was a state institution, and the president and dean of Alfred University who did the disciplining were acting on behalf of the state (407 F. 2d 83). In this case, as in many others, it is not the public access that is of significance but the public function Avco fulfills.

This Court has recognized that among the variables to be evaluated in determining whether governmental action is present are the rights to be protected and the "offensiveness" of the conduct complained of. See Wahba v. New York University, 492 F2d at 100, 102; and Grafton v. Brooklyn Law School, 478 F2d 1137, 1141-1143. In this case, as Judge Lumbard found, we are dealing with the "basic right of freedom of speech and press" (94a). Holodnak's dismissal for expressing his views is "offensive" (94a).

It deprived Holodnak of his livelihood for exercising preferred constitutional rights. It made a shambles of the Congressional policy that employees should be able to speak freely about their jobs and union representation. This policy is expressed in the Labor Management Relations Act, 29USC §157 (NLRB v. Magnavox Co, 415 U.S. 322 (1974)); and the Labor Management Reporting and

Disclosure Act, 29 USC §411(a)2 (Cole v. Hall 462 F2d 777 (2nd Cir 1973), aff'd, 422 U.S. 1 (1973).)

Avco protests in its brief that the decision below will "constitutionalize" "great numbers of American Corporations" that "sell notable portions of their products...to the government." The first answer to this is that the links disclosed in this case between Avco and the federal government are not typical of all American corporations that sell to the government. They are typical of the "specialized defense contractors" which "do all but a small fraction of their business with the Government," and the defense subsidiaries of conglomerates, such as the Stratford operation of Avco. These firms, as Professor Galbraith has recognized, differ from "predominantly civilian firms" even though the "civilian firms" have "defense divisions" with a "markedly public aspect."* To the extent that Judge Lumbard's decision will apply to the specialized defense contractors, including defense subsidiaries, that operate on Government installations producing materials for the Government under Government oversight, it should be considered welcome protection for the employees of the contractors.

The second answer to Avco is that life in our democratic nation will be enhanced if employees are protected from job reprisals for exercising First Amendment rights. Only then will they be truly free to discuss "conditions in industry and the

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*Galbraith, John Kenneth "The Big Defense Firms..." N.Y. Sunday Times Magazine, November 16, 1969, at p. 50

causes of labor disputes." Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

B. The Fact that an Arbitrator Reviewed and Upheld Holodnak's Dismissal Constituted Sufficient Government Action to Make The First Amendment Applicable.

The fact that Holodnak's dismissal was reviewed and upheld by an arbitrator constituted sufficient government action to make the First Amendment applicable. Judge Lumbard found it unnecessary to rule on this contention which was urged below (115a). If adopted, it would extend First Amendment protection in all controversies adjudicated by labor arbitrators under federal labor laws.

In Boys Market v. Retail Clerks Union, Local 770, 398 U.S. 235, 343 (1970), the Supreme Court "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management." In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Court said that federal legislation "expressed a federal policy" that "industrial peace can best be obtained" through arbitration. The substantive law to be applied in enforcing arbitration agreements is "federal law, which the courts must fashion from the policy of our national labor laws."

In Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 379 (1974), the Court enforced a "presumption of arbitrability" holding that an agreement to arbitrate implies an obligation not to strike even in the absence of a no-strike clause.

The favored status enjoyed by arbitration makes relevant the reasoning of the Court in Railway Employees v. Hanson, 351 U.S. 225, 232 (1956), where constitutional limitations were found to adhere to "union shop" agreements. The Court emphasized there that a federal statute was the "source of the power and authority"

pursuant to which the union shop arrangement was entered into, and "any private rights [were] lost or sacrificed." The Court found "governmental action on which the constitution operates" present, "though it takes a private agreement to invoke the federal sanction." The Court postponed in Railway Employees v. Hanson, supra consideration of whether a union shop agreement forced employees into patterns of ideological conformity. It dealt directly with the problem in Machinist v. Street, 367 U.S. 740 (1960), holding that a union could not use an employee's dues to support political causes the employee opposed.

For an analogous decision where "state action" as distinguished from federal action was involved, see: Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

Just as implementation of a union shop agreement involves federal action, so also does a proceeding under an arbitration agreement. The court should not permit the proceeding to be conducted in a manner that ignores constitutional rights. One more aspect of federal action that should be mentioned is that if this Court were, as Avco urges, to apply the arbitrator's decision as a bar to the litigation, the Court's action would be federal action. The court should not permit its powers to be deployed in this fashion to deprive the plaintiff of his constitutional rights. Shelley v. Kraemer, 334 U.S. 1 (1948).

Magistrate Latimer in ruling on the motions for summary judgment, rejected Avco's claim that the arbitrator was "a merely private person" (70a). He stated that "the label 'private' simply does not accurately describe the significant responsibility borne by the arbitrator in furtherance of the collective bargaining

process and as a virtual substitute for the courts in the usual case." He would not rule that the matter was of "no constitutional moment" (70a). There are no persuasive reasons for preserving arbitrators from the constitutional requirements of the First Amendment as they are applicable to courts and judges and other government institutions.

In Title VII litigation involving race or sex discrimination, courts have regularly disregarded and refused to grant finality to prior arbitration awards that have been adverse to employees. These Title VII cases are relevant here. It is unfair to an employee who is a victim of race or sex discrimination to commit his or her fate to an arbitrator selected by the company and union that share responsibility for creating, or at least tolerating, the discriminatory environment in the first place. It is unlikely that such an arbitrator, who owes his livelihood to the company and union, will be aggressive in exposing responsibility for the prevailing bigotry or disposed to imposing stringent remedies, particularly where such remedies will burden or embarrass the union and company.

The same type of analysis applies to this case. Here Holodnak was critical of his company and union and the grievance procedure, including arbitration. He was not likely to find a hospitable environment in arbitration, and he did not. In fact, Holodnak was disciplined solely for the thoughts that he expressed and no other reason since, as we have seen, there is no proof that his article resulted in overt behavior of any kind.

Typical of the cases involving race or sex discrimination where arbitrators' decisions have not had a final and binding

effect are:

Hutchings v. United States Industries, 428 F.2d 303 (5 Cir. 1970)

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7 Cir. 1969)

Newman v. Avco Corp., 451 F.2d 743 (6 Cir. 1971)

Salinas v. C. W. Murphy Industries, 338 F.Supp. 1381 (S.D. Tex. 1970)

Page v. Curtiss-Wright Corp., 332 F.Supp. 1060 (N.J. 1971)

Cf. Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. den., 406 U.S. 918 (1972).

Voutsis v. Union Carbide Corp., supra, decided by this Court, exemplifies the holdings in Title VII litigation where federal courts have declined to be bound by prior proceedings. That case involved a suit by an employee charging discrimination on account of sex. Prior to initiating the suit in the district court, the employee had brought a proceeding before the New York Division of Human Rights, where a "settlement" was effected. Based on the state proceeding, the district court granted summary judgment to the employer. This Court reversed. It held that the policy of Congress was to eliminate employment discrimination, and the statutory scheme contemplated resort to a federal remedy if the state machinery was inadequate. The Court stated that the federal remedy was both "independent and cumulative," and that it "facilitates comprehensive relief." In reaching its decision, the Court announced its unity with the Fifth, Sixth and Eighth Circuits that the doctrines of res judicata and collateral estoppel do not bar dual claims before state and federal tribunals, although double recovery would not be allowed. While the case before it involved a state administrative agency ruling, this Court specifically announced its approval of other cases where the ruling at

issue was a labor arbitrator's decision, e.g., Hutchings v. United States, 428 F.2d 303 (5 Cir. 1970).

If the arbitrator in this case were disposed to safeguard Holodnak's First Amendment rights, and he plainly was not, it is doubtful that he had the authority to do so. His powers were limited by the collective bargaining agreement including Plant Conduct Rule 19. He had no power to ignore or strike down the rule. Avco stresses this point in its brief (p. 48). The federal district courts should have no hesitation in stepping in to remedy constitutional deprivations where arbitrators have failed to act or are powerless to do so.

C. Holodnak's First Amendment Rights Were Violated by Avco

Once it is determined that Avco was required to respect Holodnak's First Amendment rights, then, as Judge Lumbard stated, it is necessary to review the circumstances of his dismissal to determine whether those rights were infringed (94a). There is little that we can add to Judge Lumbard's analysis of the relevant facts and applicable law (94a-100a).

The process, he said, was one of balancing the employee's interest in speaking his mind and the employer's interest in job efficiency. Pickering v. Board of Education, 391 U.S. 563, 568 (1968). By any fair reading, "it must be concluded that Holodnak's article was constitutionally protected" (97a). Some statements that Avco claims are statements of fact "are more reasonably read" as "rhetorical hyperbole" and are constitutionally protected (97a). Greenbelt Cooperative Publishing Assn v. Besler, 398 U.S. 6, 11-14; Watts v. United States, 394 U.S. 705 (1969).

Holodnak's "opinions concerning labor-management relations at Avco" were a "matter of employee interest" and "clearly protected" (97a). The article was plainly not defamatory. It mentioned no names and could not be said "to be of and concerning any particular individual" (96a) (New York Times Co. v. Sullivan, 376 U.S. 254, 288-292 (1962)). The case of Arnett v. Kennedy, 416 U.S. 134 (1974) was not in point. There, an employee was discharged for tortious behavior, i.e., "making recklessly false and defamatory statements" that another civil servant, identified by name in the statements, "had taken a bribe" (95a).

Holodnak was very reluctant to identify those whom he believed "had not acted in the best interests of the workers" (96a). His article was not potentially disruptive of production. It was appropriate to the rough-and-tumble of labor relations. It was no more harsh than typical union leaflets (96a).

Judge Lumbard further stressed that even in private employment where the guarantees of the First Amendment do not apply, Congress has provided by statute for the right of employees to "speak out" about their jobs (99a-100a). In NLRB v. Magnavox, 415 U.S. 322 (1974), the Supreme Court held that a provision in a collective bargaining agreement prohibiting the distribution of either pro or anti-union literature within the plant violated the rights of employees under Section 7 of the Labor Management Relations Act, 29 U.S.C. §157, even though the union had agreed to the rule in the collective bargaining agreement.

In Section 101(a)2 of the Labor Management Reporting and Disclosure Act, 29 USC §411(a)2, Congress further provided that "every

member of any labor organization shall have the right...to express any views, arguments or opinions..." (underscoring added). In Cole v. Hall, 462 F2d 277 (2d Cir. 1972), aff'd, 412 U.S. 1 (1973), this Court held that section 101(a)2 meant what it said, and protected all utterances of union members from union reprisal, even allegedly libelous statements. Any attempt by an employer to mete out punishment where a union's hand is stayed must be carefully scrutinized to ensure that there is not a collusive scheme to eliminate employee rights. Holodnak, as Judge Lumbard stated, wrote about labor management relations at Avco, "a matter of employee interest clearly protected" (97a). Only the most compelling reasons could justify the punitive action Avco took, and those reasons have not been established.

It follows from this, as Judge Lumbard held, that Holodnak's dismissal in violation of his First Amendment rights breached the collective bargaining agreement because it was not for "just cause" as required by Article V, section 1(a) of the collective bargaining agreement (100a; Ex2, 393a).

One further point: Avco has isolated certain testimony of Holodnak and misrepresented the content. During his arbitration and at the trial, Holodnak, sought to be open and candid in his responses. Avco attempts to exploit that. Thus Avco contends that Holodnak "admitted" statements in his article were "false" (209a, 210a). His testimony was that he made "some" statements "not quite accurate" in "judgment". Avco contends that Holodnak admitted that he had no support in fact for most of the "allegations" in his article (citing 228a, 297a). The cited portions of the record contain no

more than an acknowledgment by Holodnak that if he had known any part of his article was inaccurate at the time he wrote it, he would not have done so (228a).

Avco contends that Holodnak's article endorses wildcat strikes. The fact is the article states that "it is probably true that wildcats are not the answer" (397a, col. 1). Avco contends that Holodnak admitted that he had no evidence of union-busting tactics when he wrote the article (Br. p. 27). The transcript shows, as Justice Lumbard emphasized, that Holodnak was reluctant to divulge names of other persons and involve them in his troubles (484a-486a). Avco contends that Holodnak "was unable to give any instances of [the Company] buying off opposition with a foreman-ship..." (Br. p. 27). The transcript shows that Holodnak was again reluctant to name names (483a). At the trial, on redirect examination, he did name union officials who were bought off with foremanships (255a). The company did not dispute this testimony.

POINT III

THE DISTRICT COURT'S RULING THAT THE UNION BREACHED ITS DUTY OF FAIR REPRESENTATION IS FINAL AND CONCLUSIVE AND CANNOT BE REOPENED BY AVCO ON THIS APPEAL.

Judge Lumbard found that the union "failed in its duty to provide fair representation" to Holodnak; and such representation as it did provide was "sadly lacking and was arbitrary" (90a-91a). The judgment entered on that finding reads, "Plaintiff's claim that the defendant Local 1010, United Auto Workers of America, breached its duty of fair representation is upheld." The judgment on the

issue is directed against the union, not Avco. The union has not appealed and the judgment is conclusive.

"Generally, only a party cast in judgment has standing to appeal." 1B Moore's Federal Practice, §0.416(5). Avco was not such a party on the issue of fair representation, and its brief exhibits considerable uneasiness about its attempt to carry on the union's appeal for it. Avco speculates in its brief that the union "presumably" did not appeal "because Avco was appealing the judgment anyway." The problem is that Avco has no right to appeal for the union; and in any event that judgment has been paid in full and there is nothing to appeal.

Judge Lumbard concluded that "there is little doubt" that Holodnak was represented "in a perfunctory manner" (89a). Avco challenges the finding in a series of surmises about what Attorney Burstein "could well have assumed" (Br. p. 48). Avco speculates that Burstein may have agreed with it that Holodnak's First Amendment claim was weak. Burstein made no reference to the First Amendment in his brief to the arbitrator (560a-564a).

Avco conjectures that Burstein may have considered it futile to attack Rule 19. The fact is that the main argument in Burstein's brief was that Rule 19 was rarely enforced and was being applied unevenly in Holodnak's case (563a). Avco speculates that Burstein conducted his defense of Holodnak in the belief that the conduct for which Holodnak had been discharged falls in a category in which "arbitrators uniformly uphold the industrial capital punishment of discharge" (Br. p. 49). There is no evidence that Burstein believed that or had any basis for believing it. Avco has not cited

a single case in which the facts remotely resemble this one. Those arbitration cases it has cited to do not support the contention.

Avco makes no mention of the fact that Attorney Burstein repulsed offers of assistance from Attorney George Johnson, particularly with regard to the First Amendment claims (578a).

We contend that Avco has no standing to appeal the finding of unfair representation against the union; and that such appeal as it has attempted is without merit. A conclusive finding of unfair representation having been made below, the arbitrator's award upholding Holodnak's dismissal by Avco was properly set aside. As the Supreme Court said in Vaca v. Sipes, 386 U.S. 171, 187 (1967):

> "If a breach of duty by the union and a breach of contract by the employer are proven, the Court must fashion an appropriate remedy."

POINT IV

THE DISTRICT COURT HAD AUTHORITY TO AWARD PUNITIVE DAMAGES.

Avco contends that the district court had no power to award punitive damages to Holodnak. The significant question is whether an award of punitive damages is among the remedies available to a court in suits under §301 of the Labor Management Relations Act, 29 U.S.C. §185. That section is silent on the scope and character of remedies courts are empowered to grant. It simply confers federal jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization..."

The general trend of decisions under the section, however, is to encourage judicial "inventiveness" in fashioning remedies to

achieve the purposes of the Labor Management Relations Act. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57.

The objectives of the Act, and of federal labor policy in general, have consistently been seen not merely as compensating the victims of labor contract violations but of promoting peace and fairness in the industrial economy of this country. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967); Textile Workers Union v. Lincoln Mills, supra; Richardson v. Communication Workers of America, 486 F.2d 801, 806 (8th Cir., 1973).

The Supreme Court has not had occasion to rule on the specific question of whether punitive damages are available in actions brought under §301. Only one Court of Appeals, the Third Circuit, has addressed itself to that problem; and there it was closely divided, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3rd Cir., 1962). Five of the eight members of the panel felt that punitive damages were not "remedial" and therefore, not available under §301. In support of that conclusion, the majority quoted a comment by a congressman during legislative debate on the measure. 298 F.2d at 284-285. That comment, to the effect that §301 "contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate under the circumstances," plainly suggests the availability of a broad rather than a restricted scope of judicial remedies under the Act.

Nevertheless, the majority seized upon the word "remedial" in the congressman's remarks to extract an indication of legislative intent to deny the courts authority to award punitive damages. Nothing in the Act's legislative history suggests that use of the

word "remedial" in debate was meant to limit the District Court's authority, nor was there any explanation in the majority opinion of the distinction between "punitive" and "remedial". Punitive damages are almost always "remedial" in the sense that they are designed to encourage compliance with the Act and with collective bargaining agreements. Even if punitive damages were found in a particular context not to be remedial, the Act itself contains no restriction to "remedial" court action, and thus offers no basis for excluding a punitive award. It is only by forcing a converse interpretation of the congressman's remarks, an interpretation not justifiefed by the context in which they were delivered, that a restriction to "remedial" actions can be placed on Section 301.

The majority in the Brooks Shoe case also cited §303 of the Act (29 U.S.C. §187), dealing with suits against labor organizations for damages caused by violations of the secondary boycott prohibitions of the Act as a source of limitation on the remedies available under §301. Section 303 limits recovery to the damages sustained and the costs of the suit. A careful reading of the statutes, however, makes it clear, as the minority opinion points out, that it is §303 which is limited by §301, and not the other way around. Indeed, it makes more sense to say that the specification of remedies under §303 makes the lack of such specification in §301 evidence of a deliberate legislative intent to impose no such artificial restriction on judicial action in suits brought under §301.

Neither of the other two appellate decisions cited by Avco actually decided the issue of availability of punitive damages under §301. Williams v. Pacific Maritime Association, 421 F.2d 1287

(9th Cir. 1970), was disposed of on conflict-of-law principles. The plaintiff there had attempted to rely on California law in support of his claim for punitive damages. The court decided that federal law was applicable and then followed the Brooks Shoe holding without comment or discussion. In Dill v. Greyhound Corp. 435 F.2d 231 (6th Cir., 1970), the entire decision was reversed on its merits. With respect to punitive damages, the Court merely held that they were unavailable when there were no actual damages, citing Tennessee state law for that proposition. Since the District Court had found no actual damages, and since the Court of Appeals reversed the finding of a contract violation anyway, the Court, quite logically, held that there was no basis for punitive damages.

In several recent cases district courts have expressly declined to follow the majority opinion in the Brooks Shoe case and have held that punitive damages are available in actions brought under §301. The most notable of these are Sidney Wanzer & Sons, Inc. v. Milk Drivers Local 753, 249 F.Supp. 664 (N.D. Ill., 1966), which was discussed by Judge Lumbard below, and Butler v. Yellow Freight Systems, Inc., 374 F.Supp. 747 (W.D. Mass., 1974), which was decided last year at about the same time as this case. Both of these recent decisions squarely dealt with the issue of the availability of punitive damages in awards in §301 cases. Both considered the decision in Brooks Shoe. Both concluded that there is no basis for depriving federal district courts of the authority to award punitive or exemplary damages, and that there were substantial reasons in furtherance of national labor policy for employing that remedy in appropriate circumstances. See also Central Appalachian Coal Co. v. United Mine Workers of America, 376 F.Supp. 914, 926 (S.D. W. Va., 1974); Zamora v. Massey-Ferguson, Inc., 336 F.Supp. 588

(S.D. Iowa, 1972); and Patrick v. I.D. Packing Company, 308 F. Supp. 821 (S.D. Iowa, 1969), in which two other district courts were not persuaded by the majority opinion in Brooks Shoe.

Judge Lumbard cites two rationales for awarding punitive damages in this case. One is that employed in Wanzer, supra, and most of the other recent district court cases, to further the policy of federal labor laws when other remedies may be lacking. The other is as a remedy for the infringement of independent legal rights, apart from the plaintiff's contractual rights. While Judge Lumbard went on to rest his holding on the second line of reasoning, it should not be presumed that the first was rejected and hence, as Avco contends, "inapposite". Judge Lumbard simply stated, "This matter need not be decided here." We agree that the rationale chosen by Judge Lumbard is a sufficient basis for awarding punitive damages but would contend, in any event, that the alternative rationale, to further the policy of federal labor laws by deterring the violation of labor agreements, is also applicable to the circumstances of this case.

Judge Lumbard based his award of punitive damages primarily on the infringement of the plaintiff's constitutional right of free speech as well as his statutory rights under the federal labor laws. His citation of several civil rights cases in support of the exemplary award, therefore, was entirely appropriate; and there is no basis for the appellant's description of those cases as "a separate breed and patently not applicable." To say that measures found necessary to eliminate discrimination are not appropriate to protect freedom of expression is to make a value judgment between two of our most cherished constitutional privileges which

has no foundation in law or history.

POINT V

NONE OF THE CLAIMS IN THIS ACTION IS BARRED BY A STATUTE OF LIMITATIONS.

Avco's contention that this action is barred by the statute of limitations was considered three times below and rejected each time. The first time by Judge Zampano on a motion to dismiss (21a); the second time by Magistrate Latimer on a motion for summary judgment (72a); and the third time by Judge Lumbard after trial (82a).

The facts are not in dispute. The complaint was filed on February 16, 1970, well within three months from the date the arbitrator's award was delivered to Holodnak, i.e., November 22, 1969 (23a). The complaint was not served immediately because of the "heavy pressure of business in the Marshal's office" (23a, 82a). Upon learning that the Marshal could not serve the complaint promptly, Attorney Johnson, Holodnak's original counsel, immediately moved to allow service by an "indifferent person" (23a, 82a). The complaint was served on February 23, 1970, a Monday.

The three judges below who separately reviewed the circumstances of service found that Holodnak had acted with "due diligence" to secure a "substitute means to perfect service" (24a, 83a). Moreover, as Judge Lumbard noted, the last day for service was February 22, 1970, a Sunday. Under Rule 6(a) of the Federal Rules of Civil Procedure, when the last day is a Sunday, the period is extended to the end of the following day. Judge Lumbard deemed it appropriate that Rule 6 be applied by analogy to the Federal

Arbitration Act, 9 U.S.C. §12.

Avco's brief is ambiguous on the point, but is clear that the claim of a time bar is limited to the first claim for relief. The second and third claims, as Judge Zampano noted, "sound in contract and therefore are governed by Connecticut's six-year statute of limitations."

Conclusion

THE JUDGMENT BELOW SHOULD BE
IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

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74-2381

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MICHAEL HOLODNAK,

Plaintiff-Appellee,

VS.

AVCO CORPORATION, AVCO-LYCOMING DIVISION,

STRATFORD, CONNECTICUT,

Defendant-Appellant

I hereby certify that on January 17, 1975, I personally served four (4) copies of plaintiff-appellee's Brief on:

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